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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 77

MONTANA-DAKOTA UTILITIES CO., PETITIONER

v.

NORTHWESTERN PUBLIC SERVICE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Court of Appeals (VI R. 1987) is reported at 181 F. 2d 19. The oral opinion of the District Court (V R. 1883) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1950. The petition for a writ of certiorari was filed on May 17, 1950, and granted on October 9, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether under the Federal Power Act reparations for past unreasonable rates are recoverable in the courts.

2. Whether the Federal Power Commission has primary jurisdiction to determine whether a fraud has been perpetrated upon it in the filing of rate schedules when an element of such an inquiry may be the reasonableness of past rates.

3. If so, whether the District Court should stay its hand when such questions are presented in a suit to collect damages for such a fraud until after the Commission has determined them.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, Ch. 687, 49 Stat. 803, 838, 16 U.S.C. 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

STATEMENT

The Federal Power Commission files this brief *amicus curiae* because the petition for certiorari raises questions important to the administration of the Federal Power Act, and by close analogy the Natural Gas Act.

This proceeding was initiated by Montana-Dakota Utilities Co. to recover a difference between alleged reasonable rates and the rates actually paid for electricity interchanged between its assignor (and predecessors of its assignor) on the

one hand, and Northwestern Public Service Company, on the other, over a ten-year period from 1935 to 1945. The rates paid were the rates prescribed in contracts and supplementary contracts which from time to time were filed as rate schedules with the Federal Power Commission, given effective dates by orders of the Commission, and deemed by the Commission to have been duly filed under Sections 205(c) and 205(d) of the Power Act.

The district court presumed from the fact of interlocking officers and directors that respondent dominated petitioner's assignor (and before it, its predecessors). It found the rates to be "unfair,"[1] and concluded that a presumption of fraud had not

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[1] The nature of the "unfairness" found by the District Court is shown by its treatment of all components of the service rendered, in addition to the supply of energy upon which charges had been computed (i.e., interconnection facilities rental, capacity, a share of joint dispatching costs, etc.), as merely being devices for charging additionally for the energy component of the interchanged services. Thus, the District Court judgment for $779,958.30 (V. R. 1965) was for an aggregate of several amounts relating to payments made or received by Northwestern, to or from the predecessors of Montana-Dakota, plus interest thereon. The interconnection facility rental charges (V R. 1950, 1959, 1963; I R. 35, 61, 87, 103; V R. 1942-1947), interchange capacity charges (V R. 1959-1960, 1963), and dispatching costs (V R. 1960, 1963) were found by the District Court to be charges by Northwestern for energy delivered by it, and part of a scheme to offset the price paid by Northwestern for energy received by it (V R. 1959), i.e., further reductions in Northwestern's 5-mill payment already found to be less than "just and reasonable" (V R. 1941, 1944-1945, 1948, 1960). All four of the above amounts were held to have been underpaid to Montana-Dakota's predecessors, or charged and exacted from them (as the case may be), "unlawfully, wrongfully and fraudulently" (V R. 1963-1964).

been rebutted by respondent (V R. 1963). It accordingly entered judgment for petitioner for $779,958 (V R. 1965).

The Court of Appeals, without reviewing the merits of the case, held that the Federal Power Commission, not the courts, had primary jurisdiction both to determine the reasonableness of rates and charges and to inquire into whether a fraud had been perpetrated upon the Commission. The court accordingly ordered the district court to dismiss the complaint.

SUMMARY OF ARGUMENT

I

Although the Federal Power Act was modeled on the Interstate Commerce Act, reparation provisions were deleted from the bill as inappropriate for a statute regarding only wholesale transactions. For reparations for past overcharges to purchasing utilities would not be passed on to the ultimate consumers whom the statute was designed to protect, and who had already reimbursed the utility for the excessive costs. The result would not be merely to give the purchasing utility a windfall. More importantly, it would provide an incentive not to follow the statutory procedure for challenging rates in advance of the effective date, but to pay the excessive rate and seek subsequent reparations at a time when the excess would not have to be returned to the ultimate consumers. Moreover, to allow subsequent

reparations would be inconsistent with the statutory scheme, which contemplates that changes must be made in the filed rates at a time when they can be translated into benefit to the ultimate consumer. This result is not unfair to the purchasing utility, which can utilize the procedures of the Act to protect itself against excessive rates. All of these considerations demonstrate that Congress did not intend a remedy by way of reparations to be available either before the Commission or in the courts.

II

The Power Commission does possess the authority to determine whether a fraud has been perpetrated on it in the filing of rate schedules. The power to correct an error induced by fraud is inherent in any tribunal, and such authority is, in addition, clearly granted by provisions of the Federal Power Act authorizing the Commission to perform any act and to issue, amend or rescind any order it may find necessary or appropriate to carry out the provisions of the Act, and to determine whether the Act was being violated. Inasmuch as the Commission is required to approve interlocking directorates and to pass upon the effect of corporate affiliation and less-than-arm's-length dealing, as well as to determine the reasonableness of rates, the type of fraud found to exist in this case relates to subjects with which the Commission is peculiarly well-fitted to deal. The

fact that the inquiry into an alleged fraud may require a consideration of the reasonableness of past rates does not deprive the Commission of jurisdiction, even though it has no authority to *fix* past rates in a reparations proceeding. The Commission possesses the authority to investigate the lawfulness of past rates in an appropriate situation in the public interest, such as when necessary to aid a court or state administrative agency.

III

In such circumstances, when the jurisdiction of a court is invoked to collect damages for the alleged fraud, the court should stay its hand until the Commission has exercised its primary jurisdiction to determine whether a fraud has been committed and the ancillary question of the reasonableness of rates. There is ample analogy in the precedents, in very similar situations, for such a proceeding. *United States* v. *Morgan,* 307 U.S. 183; *Atlantic Coast Line Co.* v. *Florida,* 295 U.S. 301; *Thompson* v. *Texas Mexican R. Co.,* 328 U.S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422.

ARGUMENT

Introductory Analysis

Under the Federal Power Act, all rates must be filed with the Commission (Section 205(c), 16 U.S.C., Sec. 824d(c)); all rates are required to be "just and reasonable", with other rates "declared to be unlawful" (Section 205(a), 16 U.S.C., Sec.

824d(a)); and the Commission has authority, on complaint or on its own motion, to suspend proposed changes in filed rates pending an inquiry into their lawfulness (Section 205(e), 16 U.S.C., Sec. 824d(e)).[2] On complaint, or its own motion, the Commission also has authority to investigate any filed rate and, after hearing, if found to be "unjust, unreasonable, unduly discriminatory or preferential," to fix the "just and reasonable" rate "to be thereafter observed" (Section 206(a), 16 U.S.C., Sec. 824e(a)). The Act contains no provision for either the administrative or the judicial determination of the lawfulness of past rates in a reparation proceeding—and this omission, as we shall show, was deliberate. Under the statutory scheme and in fact, purchasers of electric power at wholesale—and it is only wholesale rates which are subject to the Commission's jurisdiction under Part II of the Act here involved—protect themselves against excessive rates by filing complaints with the Commission before changes in filed rate schedules become effective or by filing complaints for relief from filed rates alleged to be unlawful.

In this case petitioner claims that by reason of prior affiliation of its predecessors (hereafter re-

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[2] Section 205(e) empowers the Commission to suspend the new rates for a period of five months; if the administrative proceeding is not concluded by the expiration of that period, the proposed change of rate may go into effect, but the Commission may require the utility to "keep accurate account * * * of all amounts received by reason of" the change in rates, and may subsequently require a refund of any amounts paid in excess of the rate subsequently found to be justified.

ferred to as petitioner) with, and domination by, respondent, it was fraudulently deterred from objecting to the rates and charges either before or after they became effective, until after the affiliation between the two companies was dissolved in 1945. Its contentions are (1) that since the Commission lacks power to grant reparations for a departure in the past from the "just and reasonable" standard of Section 205(a), the statute should be construed to vest such power in the district courts; and (2) that, whether or not this is true generally, such a remedy must be available when resort to the remedy *in futuro* contained in the statute is prevented by the fraud of the other party.

It is the position of the Government (1) that Congress deliberately omitted provisions for reparations from the Federal Power Act both because they were unnecessary to protect the wholesale distributors with whom the Act deals, and because to permit such distributors to recover reparations after they had passed on the costs of the past rates to the ultimate consumers would be inconsistent with the statutory scheme and detrimental to the effectuation of the purposes of the Act; (2) that, in the exceptional situation where the statutory remedy *in futuro* is ineffective for some such reason as the fraud claimed here, the proper remedy is to apply to the Commission to vacate the schedules fraudulently filed; and (3) that if there is any implied right to recovery in the

courts, the courts must await the Commission's prior determination as to whether a fraud has been perpetrated upon it and as to matters relating to the reasonableness of rates.

I

The Federal Power Act Does Not Provide for or Contemplate the Recovery of Reparations

A. *A Provision for Reparations was Deliberately Eliminated from the Federal Power Act*

In enacting the Power Act, Congress for the first time applied to the regulation of wholesale rates,[3] rate regulatory procedures and principles which had theretofore developed exclusively in relation to retail rates, particularly as embodied in the Interstate Commerce Act.[4] To do so it adopted the Commerce Act procedural provisions with the construction placed upon them by the

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[3] The wholesale rates involved were those beyond the powers of state regulation under the commerce clause. *Publ. Util. Comm.* v. *Attleboro Co.*, 273 U.S. 83; *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298; *cf., Interstate Natural Gas Co.* v. *F. P. C.*, 331 U.S. 682, 687-688.

[4] A comparison of the rate regulatory provisions of the Power Act, Sections 205 and 206, with those of the Commerce Act (49 U.S.C. §§ 1(5), 6(1), 6(3), 6(5)-6(7), 6(9), 13, 14, 15(1), 15(3) and 15(7)) shows their similarity, a similarity admitted by petitioner in its brief in the Court of Appeals (Br. Appellee, p. 31). The legislative history of the Power Act shows that generally it was patterned on that Act, the Communications Act (47 U.S.C. §§ 151, *et seq.*; see particularly §§ 201-205) and in places on state regulatory statutes. *Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423* (74th Cong., 1st Sess.), pp. 392, 393, 2170.

courts.[5] Under that construction the filed rate is the only legally enforceable rate and the courts will not undertake the direct enforcement of the "just and reasonable" standard of "lawful" rates. Otherwise, this Court has reasoned, the rates enforced would vary from case to case, defeating the purpose of Congress to secure uniform and nondiscriminatory rates,[6] and court-fixed rates would conflict with commission-fixed rates, rendering enforcement of the Act impossible (*Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439, 440-441). The policy of judicial restraint thus established "is one having regard for the expertise of special agencies charged with performing the rate-making function and for the inherent actual, as well as legal, disability of courts to execute that function" (*United States* v. *Jones*, 336 U.S. 641, 652-653, 670-671; *cf., United States*

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[5] *Shapiro* v. *United States*, 335 U.S. 1, 16, and cases there cited.

[6] Petitioner attempts to distinguish the Power Act from the Commerce Act on the ground that the former is concerned with rates in sales to a limited number of, or frequently only one, customer and hence is not affected by the same Congressional purpose of uniformity and nondiscrimination as the Commerce Act. But this is answered by the explicit provisions of Section 205 (b) of the Power Act against discrimination and preferences. Congress intended that even where there is only one purchaser under a filed rate, that rate be posted and filed so as to be disclosed to state utility commissions and all other existing or potential wholesale customers, including any who might apply for compulsory service under Section 202(b) of the Federal Power Act. In this way the objective of Congress to promote greater integration and coordination of electric facilities is served. That objective is clearly shown in the legislative history of the Act. *Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423*, pp. 2148-2169, 501, 517, 520, 531-535, 384-385, 392.

v. *I.C.C.*, 337 U.S. 426, 437, 463-465). Even the express preservation of common law remedies in the Commerce Act did not prevent the adoption of the rule. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446.

But the Power Act contains no provision for reparations such as is found in the Interstate Commerce Act. As originally introduced in the House and Senate, the bills subsequently enacted as the Public Utility Act of 1935 (Title II of which amended the Federal Water Power Act and gave it the new short title, Federal Power Act) expressly provided for Commission reparations awards enforceable in the courts. That provision read as follows in both bills:[7]

> Sec. 213. (a) When complaint has been made to the Commission concerning any rate or charge for any service performed by any public utility, and the Commission has found after investigation that the public utility has charged an unreasonable, excessive, or discriminatory amount for such service in violation of any provision of this title, the Commission may order that the public utility make due reparation to the complainant thereunder, with interest from the date of collection. No such order shall be issued unless the complaint is filed with the Commission within two years from the date of the payment.

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[7] *Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423*, 74th Cong., 1st Sess., p. 36; *Hearings, S. Committee on Interstate Commerce, on S. 1725*, 74th Cong., 1st Sess., p. 43.

(b) If the public utility does not comply with the order for the payment of reparation within the time specified within such order, action may be begun in any court of competent jurisdiction to recover the same within one year from the date of the order, and not thereafter.

In a sectional analysis of the bill submitted by Mr. Dozier A. DeVane, Solicitor of the Commission, who was one of the draftsmen of the bill,[8] that Section was referred to as containing, "the usual utility law provisions, permitting complaints to the Commission and orders for reparation in cases where unreasonable or discriminatory rates have been charged."[9]

That provision was, however, eliminated from the bill as reported out of the Senate Committee, with the succinct explanation (referring to it and another provision also eliminated, S. Rep. No. 621, 74th Cong., 1st Sess., p. 20):

> They are appropriate sections for a State utility law, but the committee does not consider them applicable to one governing merely wholesale transactions.

The deletion of this provision had been requested by the National Association of Railroad and Utilities Commissioners, whose general solicitor, Mr.

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[8] Hearings, S. Committee, *ibid.*, p. 223.
[9] Hearings, S. Committee, *ibid.*, p. 247.

John E. Benton, made the following illuminating statement of reasons (H. Hearings, *ibid.*, p. 1685):

> That is an entirely proper provision in a railroad statute. When a man goes to the railroad station with a load of goods to ship somewhere he has to ship at the rate that is fixed in the tariff. He must make the shipment then; and he ought to be able to come thereafter to the Commission and show that he was required to pay an unreasonable rate, if it was unreasonable, and to ask for a determination of a reasonable rate and get reparation that is due him for any overpayment. That is perfectly proper. But this bill relates only to service *between the wholesale generating or producing company and the distributing utility.* We question whether the *public interest will be served by giving any company the right to go ahead receiving service at the established rate for 2 years, and then to bring a complaint before the Federal Commission that the rate has been unreasonable.* [Italics supplied.]

B. *Reparations Would Not Be Passed On To the Ultimate Consumer Who Has Already Reimbursed the Distributing Utility for the Excessive Cost of the Power.*

The reason why reparations for wholesale electric purchasers would be inappropriate and not in "the public interest" is because wholesale electric purchasers are themselves typically regulated utilities. As such, the filed rates they pay in obtain-

ing their supply of electricity are part of their costs of operation. Their ability to pass along to their customers any excess of the filed rate over a just and reasonable rate paid for their purchased electricity is normally assured either by their government-granted monopoly position or their legally protected right to rates covering operating expenses plus a fair return. It is not dependent upon whether economic conditions will permit them to include it in a price for a commodity or service sold and delivered in a competitive market, as is true, for example, in the case of a purchaser of freight transportation services. Cf. *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 237-238. As this Court said in *F.P.C.* v. *Interstate Natural Gas Co.* (336 U. S. 577, 582): "* * * experience does not indicate that utilities are wont to charge themselves out of business."

For Congress to have provided a reparations award for such a purchaser would result in a lump sum recovery by the purchaser after the year had closed in which it had incurred the excessive expense for power purchased at the filed rate. Such a reparations award could not lower the purchaser's resale rates during the past period covered by the award. During that period those resale rates would have been determinable on a basis which would reimburse it for its expenditures for purchased power at the filed rate it was currently paying, without any deduction for the

contingency of a reparations award at a later date. Nor could it affect future rates, for such lump sum award, when realized, would be an unusual and nonrecurring income. *Knoxville* v. *Water Co.*, 212 U.S. 1, 14; *Galveston Elec. Co.* v. *Galveston*, 258 U.S. 388, 395; *Board of Comm'rs.* v. *N. Y. Tel. Co.*, 271 U.S. 23, 32; *Los Angeles Gas Co.* v. *R. R. Comm'n*, 289 U.S. 287, 313.

Not only would ultimate consumers therefore not benefit through reduced retail rates from reparations at the wholesale level but, speaking generally, ultimate consumers could not reach the proceeds of the award in the hands of the utility wholesale purchaser by way of their own reparation proceeding against it, either before the state regulatory agency or the courts. As to the state regulatory agencies, they are typically without any reparation power.[10] Even where they do have reparation power, they are frequently unable to award reparation where the rates attacked as unreasonable have been prescribed by them in the exercise of their quasi-legislative function.[11]

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[10] See, *e.g.*, *T. R. Miller Mill Co.* v. *Louisville & Nashville R. Co.*, 207 Ala. 253, 92 So. 797; *City of Atlanta* v. *Atlanta Gas-Light Co.*, 149 Ga. 405, 100 S.E. 439; *Texas & Pac. Ry. Co.* v. *Railroad Commission*, 137 La. 1059, 69 So. 837; *State ex rel Railroad* v. *Public Service Commission*, 303 Mo. 212, 218, 259 S. W. 445; *Re Arkansas Power & Light Co.*, 46 P.U.R. (N.S.) 226 (Ark. Com.); cf. *Dunlap Lumber Co.* v. *Nashville, etc. R. Co.*, 129 Tenn. (2 Thomp.) 163, 165 S. W. 224.

[11] *State ex rel. Boynton* v. *Public Service Commission*, 135 Kan. 491, 11 P. 2d 999; *Northern Pac. Ry. Co.* v. *Dept. of Public Works*, 136 Wash. 389, 240 Pac. 362; cf. *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U.S. 370, 389.

Moreover, in several states, the courts have held that the common law right to sue for reparation was abolished by the change to commission supervision.[12] And even where a common law reparation proceeding may be instituted in the courts, the courts are bound by an administratively prescribed rate and barred from investigating into its reasonableness.[13] In many states the bar to judicial inquiry into the reasonableness of the rate attacked is extended to the situation where the regulatory agency has not affirmatively prescribed the attacked rate but merely accepted it for filing, whereby, it is held, the rate becomes a "commission rate" in contradistinction to a "carrier rate."[14] The bar to judicial inquiry which is present in jurisdictions in which the regulatory

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[12] See, *e.g.*, *Graham Ice Co.* v. *Chicago, M. & St. P. R. Co.*, 153 Wis. 145, 140 N. W. 1097; *Gurney Heater Mfg. Co.* v. *New York, N. H. & H. R. R. Co.*, 264 Mass. 427, 162 N. E. 897; *Crook* v. *Baltimore & O. R. Co.*, 32 Ohio App. 263, 167 N. E. 899; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 212 Cal. 370, 298 Pac. 991; *Woodrich* v. *Northern Pac. Ry. Co.*, 71 F. 2d 732 (C.A. 8); cf. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. See also, Note, *The Shipper's Right to Recover for Unreasonable Railroad Rates*, 21 Iowa L. Rev. 751, 758.

[13] *State ex rel. Boynton* v. *Public Service Commission*, 135 Kan. 491, 11 P. 2d 999.

[14] *T. R. Miller Mill Co.* v. *Louisville & Nashville R. Co.*, 207 Ala. 253, 92 So. 797; *E. L. Young Heading Co.* v. *Payne*, 127 Miss. 48, 89 So. 782; *Suburban Water Co.* v. *Borough of Oakmont*, 268 Pa. 243, 110 Atl. 778; *Mathieson Alkali Works* v. *Norfolk & W. Ry. Co.*, 147 Va. 426, 137 S.E. 608; *Missouri-Kansas & T. R. Co. of Texas* v. *Railroad Commission*, 3 S. W. 2d 489 (Tex. Civ. App.); cf. *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. 2d 443, 446 (C.A. 5) (Hutcheson, J., concurring).

agency has no reparation power leaves ultimate consumers wholly without remedy.[15]

It is perfectly clear, therefore, that for Congress to have provided for recovery of reparations by the utility purchasers who pay the wholesale rates regulated in the Power Act would have been to provide a windfall to them, and would have been of no benefit to the ultimate consumers, whom the Act was designed to protect.[16] As the court said of the similar provisions of the Natural Gas Act in *Federal Power Commission* v. *Interstate Gas Co.*, 336 U. S. 577, 581:

> * * * The aim of the Act was to protect ultimate consumers of natural gas from excessive charges. * * * They were the intended beneficiaries of rate reductions ordered by the federal commission, though state machinery might have to be invoked to obtain lower rates at the consumer level. The rates charged a wholesaler are part of its costs, reflected in its rate base. Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility. * * *

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[15] *Straube, et al.* v. *Bowling Green Gas Co.*, 227 S. W. 2d 666 (Mo. 1950); *Purcell* v. *New York Cent. R. R. Co.*, 268 N. Y. 164, 197 N.E. 182, appeal dismissed, 296 U.S. 545; *Utah-Idaho Cent. Ry. Co.* v. *Public Utilities Commission*, 64 Utah 54, 227 Pac. 1025; cf. *Charleston Apartments Corp.* v. *Appalachian Electric Power Co.*, 118 W. Va. 694, 192 S. E. 294; Hardman, *The Finality of the Filed Rate in West Virginia*, 49 W. Va. L. Q. 143, 150, *et seq.*

[16] Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423, 74th Cong., 1st Sess., pp. 427, 447, 498.

C. *To Permit the Recovery of Reparations Would Be Inconsistent With the Purpose of the Statutory Scheme and Might Impair Its Effectiveness.*

1. TO ALLOW REPARATIONS WOULD TEND TO DEFEAT THE PURPOSE OF THE POWER ACT.

The evil which Mr. Benton foresaw if the purchasing utility were permitted "to go ahead receiving service at the established rate for two years, and then to bring a complaint before the Federal Commission that the rate has been unreasonable" was not merely that one utility company would receive a windfall at the expense of another without passing the benefit on to the ultimate consumer who had already repaid the utility for the original excessive rates. If, instead of availing itself of the statutory procedure for challenging the reasonableness of rates as provided in Sections 205(e) and 206(a), a distributing utility had the option of recouping the excessive charges itself through a subsequent reparation proceeding, its pecuniary interest might cause it deliberately to adopt the latter course so that it would not have to pass on the reduction in rates to the consumers. For if the purchasing company proceeds to challenge rates as soon as they are filed and succeeds in having the rates reduced, it would be expected—and if necessary compelled by the appropriate state agency—to pass on the reduction to its customers. On the other hand, if it continued to

charge a rate which gave it a fair return based on the excessive cost of the power to it, and brought a reparation proceeding several years later, it could keep the difference between the filed rate and the rate found subsequently—whether by court or Commission—to be reasonable. This removal of the incentive to follow the procedures prescribed in Sections 205(e) and 206(a) could reasonably be expected to defeat the underlying purpose of the Act by opening up an avenue for wholesale rate reductions which would not have to be passed on, and would also circumvent the statutory scheme for exclusive judicial review by the Courts of Appeals (Section 313(b)).

2. TO ALLOW REPARATIONS WOULD BE INCONSISTENT WITH THE STATUTORY SCHEME.

The Power Act seeks to make ultimate consumers the beneficiaries of its wholesale rate regulation by preventing wholesale rate changes from being made without notice and opportunity for timely action at the retail level. Such action might consist of action by ultimate consumers, or state commissions acting in their behalf, to require concurrent reductions in retail rates to reflect changes in wholesale rates, either by the utility purchasing under a filed rate which has been lowered, or by other local distributing utilities who might be able to effectuate savings by buying from the same source at the new low rate. Or it might consist of efforts by such parties to require the utility pur-

chasing under a filed rate which has been raised to absorb the increase out of otherwise excessive earnings, or to limit its increase in retail rates to the amount necessary to absorb the wholesale rate increase, or to resort to some other, cheaper source of electricity.

Such action as may be appropriate can be taken only if the filed rate is the legal rate, *i.e.*, the rate which shall prevail, by compulsion of court processes if necessary. Otherwise, if the filed rate or commission-fixed rate prescribed in lieu thereof, were not always the legal rate and changes could be made ignoring it, consumers and state regulatory commissions would have no assurance of an opportunity for taking into account the changes in wholesale rates (and their effect on retail distributing companies) early enough to attend to the appropriate resulting adjustment of the retail rates. For this reason, it is important that the purchasing utility be required to make its challenge to the reasonableness of the rate before that rate becomes effective, and not subsequently in a reparations proceeding.

That it was the intention of Congress to rely on the Commission's administration of the filing provisions, and Commission action, prospective in nature, bringing filed rates into conformity with the standard of just and reasonable rates, is shown by the relative prominence in the Act of provisions conferring powers to ascertain the facts in advance and to accumulate the data necessary to enable

the Commission to act effectively and promptly when a change is filed.

Thus, without waiting for a rate case to arise, the Commission is authorized (Section 208) to investigate and determine the principal fixed facts necessary for a rate case, with respect to each company subject to its regulation. Aiding such a determination are the accounting powers of the Commission (Sections 301 and 302) under which virtually all such companies' accounts have already been restated on a sound basis.[17] Provisions for periodic and special reports (Section 304), filed statements (Section 307) and investigations (Section 311) have resulted in the accumulation of a body of detailed data about each company in the industry, from which statistical compilations and computations of unit costs [18] provide standards for comparison and appraisal of the capital and operating costs of individual companies rendering particular classes of service to particular classes of customers. Annually filed Financial and Statistical Reports (F.P.C. Forms Nos. 1, 1-A, 1-B, 1-C), and Power System Statements (F.P.C. Forms 12, 12A, 12D) enable quick checks to be

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[17] F.P.C., *Report on the Reclassification and Original Cost of Electric Plant of Public Utilities and Licensees, 1950.*

[18] *E.g.*, F.P.C., *Electric Power Statistics;* F.P.C., *Electric Utility Depreciation Practices;* F.P.C., *Electric Utility Cost Units, Steam-Electric Generating Stations;* F.P.C., *Electric Utility Cost Units, Hydroelectric Generating Stations;* F.P.C., *Statistics of Electric Utilities;* F.P.C., *Steam-Electric Plant Construction Cost and Annual Production Expense.*

made on general questions with respect to a company's operations, on a relatively current basis.

All of these data facilitate scrutiny of filings of proposed changes in rates within the 30-day notice period and assist in complying with the statutory mandate (Section 205(e)) that where rate changes are suspended, "the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

The statutory emphasis on these provisions, particularly as contrasted with the complete silence on court reparations, is sufficient in itself to indicate that Congress intended the "just and reasonable" standard to be effectuated upon the basis of the Commission's prospective determination of all questions relating to rate schedule filings and to whether filed rates satisfy the statutory standard, even if there may be, under the particular circumstances of some case, justification for retrospective consideration of any of those questions.

D. *The absence of a procedure for obtaining reparations from the Commission does not mean that such a remedy was to be available in the courts, but that reparations were not to be recoverable at all.*

The history and purpose of the Federal Power Act, together with the effect of a contrary construction, all lead to the conclusion that Congress

intended that there be no remedy by way of reparations for charging an unreasonable rate in the past. This result is not unfair to the purchasing utility in the normal case, since it can—and will, if a remedy by reparations is not open to it—protect itself against unreasonable rates by means of a complaint filed with the Commission before newly filed rates become effective or a complaint filed promptly with respect to existing rates. (As to the exceptional case of fraud, see Point II, *infra*, pp. 24-32.) Nor does this result mean that the "just and reasonable" standard of lawfulness serves no practical or useful function. For this standard is the statutory guide to the Commission in the exercise of the powers delegated to it under Sections 205(e) and 206(a). It was upon the exercise of those Commission powers that Congress relied exclusively in this new venture in wholesale rate regulation.

All of the considerations referred to herein, which demonstrate that Congress did not contemplate or intend that there be a remedy by way of a procedure for reparations, apply at least as forcefully to a suit in court as to an administrative proceeding. The fact that Congress deleted from an early draft of the bill the provision for a remedy before the Commission, enforceable in the courts, does not mean that it was relegating the parties to a suit at law. For under the well-known rule of the *Abilene* case, resort to the Com-

mission rather than to the courts was obviously thought to be necessary for a determination as to the reasonableness of rates, whether for reparations or any other purpose. Thus, elimination of the administrative reparations remedy was doubtless thought to cover the whole subject of reparations, and not as merely transferring the reparations proceeding from the Commission to the courts. That such was not the intent is indicated by the statements of explanation in the legislative history (see pp. 11-13, *supra*), as well as by the other reasons why a remedy for past overcharges was neither necessary nor desirable.

II

The Commission Has Authority to Determine Whether a Fraud Had Been Perpetrated Upon It in the Filing of Rate Schedules

In the instant case, the district court found that the "frauds practiced by defendant on the Federal Power Commission and on [petitioner's predecessors] also made the attempted filing of rates by the defendant void and ineffective for any purpose whatsoever" (V R. 1961). The Court of Appeals did not find it necessary to review the finding of fraud, and for present purposes we shall assume that respondent's conduct was fraudulent.

The Court of Appeals did not suggest that the victims of fraud are remediless, when the fraud itself prevents them from availing themselves of the statutory remedies. And we make no such

contention here. The Court of Appeals found, however, that the proper agency to correct a fraud perpetrated upon the Commission, through the filing of schedules fraudulently prepared, was the Commission itself.

Petitioner does not deny that there must be resort to the administrative remedy if one is available; its position, as we understand it, is that there is no such remedy. Thus, the point at issue is whether the charge of fraud raises a question which the Commission may resolve.

In order to recover on the basis of fraud, petitioner must establish both that the filed rates were not validly filed because of the fraud and that the rates were unreasonable.[19] Both of these questions are within the primary jurisdiction of the Commission.

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[19] More particularly, recovery would depend on decision of the following questions, among others, within the primary jurisdiction of the Commission:

(1) Were the rate schedules originally filed, or any subsequent changes, accepted for filing by the Commission erroneously because the concurrences of petitioner's predecessors in such filings (V R. 1581; I R. 343-345, 297-298), which were required by the Commission's rules (18 CFR 35.3(a)), were obtained by fraud?

(2) Were the Commission orders giving effective dates to the originally filed rate schedules, or any of the changes therein, erroneous because fraud deterred petitioner's predecessors from objecting to the applications for such orders?

(3) Did the Commission erroneously leave the originally filed rates, or any changes therein, in effect, without finding them to be unjust and unreasonable, because petitioner's predecessors were deterred by fraud from complaining of the rates?

(4) Will corrective action with respect to any of the above errors be necessary or appropriate to carry out the provisions of the Power Act?

As Mr. Justice Roberts declared, when speaking as Umpire for the Mixed Claims Commission:[20]

> Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

Cf. Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238; *Federal Communications Comm.* v. *WOKO*, 329 U.S. 223; *Schachter, et al.* v. *Singer*, 45 A. 2d 364 (M.C.A.D.C.); *Gould* v. *Delsnider*, 42 A. 2d 140 (M.C.A.D.C.), reversed on other grounds, 154 F. 2d 844 (C.A.D.C., 1946).[21]

The Commission's authority to vacate a filing induced by fraud does not rest merely on this general principle. As the Court of Appeals observed (R. 1995), Section 309 of the Power Act gives the Commission authority to "perform any and all acts, and to * * * issue, * * * amend, and rescind such orders * * * as it may find necessary or appropriate to carry out the provisions of this Act." And the Commission is also authorized by Section 307(a) to "determine whether any person has violated * * * this Act or any rule, regulation,

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[20] Mixed Claims Commission, United States and Germany (Opinions and Decisions, January 1, 1933, to October 30, 1939, pp. 1127-1128).

[21] In the *Schachter* and *Gould* cases, the Municipal Court of Appeals for the District of Columbia held that the District Rent Administrator, rather than the courts, had authority in the first instance to vacate rent ceiling orders procured by misrepresentation.

or order thereunder," to take evidence and hold hearings (Section 307(b)), to have access to the companies' files (Section 301(b)), and to require reports (Section 304(a)). Even apart from the implied power to vacate an order procured by fraud, it would certainly be appropriate for the Commission to make use of these statutory powers for that purpose.

Petitioner's assertion that "the fraud question is not one with which a commission is especially equipped to deal" (Pet. 25), will not stand up under analysis. For the "fraud" here involved is that set forth in the District Court's conclusion of law (V R. 1963):

> 13. All of the contracts in question were presumptively fraudulent as to Plaintiff's [Petitioner's] assignor and its predecessors in view of the common directors and officers. Defendant [Respondent] has failed to rebut this presumption and sustain the fairness of the contracts.

Thus, the bases of the fraud are (1) the fact of interlocking directors and officers between the two companies, and (2) respondent's failure to convince the court of the "fairness" of the contracts, i.e., reasonableness of the rates.

Contrary to petitioner's contention, both of these matters are peculiarly appropriate for Commission appraisal. For under Section 305(b) of the Act, officers and directors of companies sub-

ject to the Act may hold interlocking positions only with the approval of the Commission; and indeed, such approval had been granted in this case (I R. 359-362; cf. V R. 1510, 1587-88). As a practical matter the investigation and appraisal of the effect of affiliation and less-than-arm's length-dealing between electric utility operating companies has frequently engaged the attention of the Commission, and is, in fact, a routine aspect of its work.[22] Improper or fraudulent conduct in such relationships is clearly a subject with which the Commission is especially equipped to deal. And the same is obviously true as to the reasonableness of rates.

This does not mean that the Commission has power to award reparations. That would be inconsistent with the legislative history and purposes of the Act, as we have shown (*supra*, pp. 9-22). But it does mean that whatever rights

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[22] *Alabama Power Company*, 1 F.P.C. 25, 39, affirmed in relevant part, 94 F. 2d 601, 617-618 (C.A.D.C.); *Alabama Power Company*, 2 F.P.C. 432, 443, 444, affirmed in relevant part, 134 F. 2d 602, 609 (C.A. 5); *Alabama Power Company*, 2 F.P.C. 479, 486, affirmed in relevant part, 136 F. 2d 929, 930 (C.A. 5); *Canadian River Gas Company, et al.*, 3 F.P.C. 32, 43, affirmed, 324 U.S. 581, 606-608; *Pennsylvania Power & Light Company*, 3 F.P.C. 89, 95, 111, affirmed 139 F. 2d 445, 450 (C.A. 3), certiorari denied, 321 U.S. 798; *Hope Natural Gas Company, et al.*, 3 F.P.C. 150, 178, 179, affirmed on this point, 134 F. 2d 287, 307 (C.A. 4); *Niagara Falls Power Company*, 3 F.P.C. 206, 221-223, affirmed, 137 F. 2d 787, 793-795 (C.A. 2), certiorari denied, 320 U.S. 792; *Pudget Sound Power and Light Company*, 3 F.P.C. 231, 236, 240, affirmed, 137 F. 2d 701, 703 (C.A.D.C.); *California Oregon Power Company*, 3 F.P.C. 368, 374, affirmed, 150 F. 2d 25, 27 (C.A. 9), certiorari denied, 326 U.S. 781; *Cities Service Gas Company*, 3 F.P.C. 459, 480-482, affirmed, 155 F. 2d 694, 703 (C.A. 10), certiorari denied, 329 U.S. 773; *Tennessee Gas and Transmission Co., et al.*, 6 F.P.C. 98, 101.

petitioner may have in the courts are dependent upon the establishment of the answers to questions which the Commission has power to answer in ascertaining and correcting any errors in its action or inaction resulting from fraud. When it has done so the rights of interested parties can be determined and enforced by appropriate administrative or court proceedings as though the correcting Commission action had been effective as of the date of the original error.

Thus if the Commission should find that one or more of the earlier filed rate schedules was validly filed and not affected by fraud, but that some of the subsequent filings of changes in rates were invalid because of fraud, the Commission might vacate the invalid changes and vacate its orders giving them effective dates. The earlier filed rates would then be left standing unchanged by the purported filings of subsequent changes. For charging rates differing from the filed rates left standing such remedies would lie as in any other case in which rates other than filed rates have been charged.

Or the Commission might find that the filings were valid, but that, had it not been for the fraud, it would have suspended one or more of them and fixed and prescribed rates in lieu thereof. Or the Commission might determine that the filings were validly made, that the information submitted in response to the inquiries which were made (I R. 266-323) had furnished sufficient data

to enable a proper determination, and hence that the rates and changes were all validly filed, were properly not suspended, and that the payments made in accord therewith were in full compliance with the statute and the rules. In that case there would be no occasion for recourse to the courts.

The Commission is not precluded from inquiring into questions raised by this case by reason of its lack of power to grant reparations. We have already shown that the Commission has ample power to take corrective action with respect to rates procured by fraud. And, we submit, the Commission also possesses the power to investigate and determine the lawfulness of the past rates in an appropriate situation,[23] such as where a determination of the reasonableness of rates is an essential element in an inquiry into an alleged fraudulent filing, even though it may not have the power to fix such rates.

In addition to the general authority granted the Commission by Section 309 to "perform any and all acts * * * necessary or appropriate to carry out the provisions of this Act," Section 307(a) empowers the Commission to investigate any matter in order to determine whether any person has

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[23] The Court of Appeals for the Fourth Circuit held to the contrary in *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287, reversed on other grounds, 320 U.S. 591. The Government argued in this Court that the Commission had such power (No. 34, 1943 Term, Brief for Pet., pp. 115-121), but this Court found it unnecessary to decide the question. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618.

violated any provision of the Act, and Section 205(a) explicitly forbids and declares unlawful the charging of unjust and unreasonable rates. Since the charging of such rates is an unlawful act and in violation of Section 205(a), an investigation of the lawfulness of past rates is clearly within the ambit of the investigatory power granted the Commission by Section 307(a).[24] Moreover, the Commission may, upon its own motion or at the request of a state commission, investigate and determine the cost of production or transmission of electrical energy in cases where it may not establish rates (Section 206(b)),[25] and is required by Section 209(c) to make available to the several state commissions such information and reports as may be of assistance in state regulation of public utilities. The findings as to past rates, even apart from fraud, fall within the contemplation of these provisions, constituting not

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[24] The Interstate Commerce Commission has made similar determinations under an analogous provision of the Motor Carrier Act of 1935 (Secs. 216, 217). See *W. A. Barrows Porcelain Enamel Co.* v. *Cushman Motor Delivery Co.*, 11 M.C.C. 365, 366; *Dixie Mercerizing Co.* v. *ET & WNC Motor Transportation Co.*, 21 M.C.C. 491, 492.

[25] Petitioner attempts (Pet. 27-28) to construe the power to determine cost of service granted by Section 206(b) as falling short of the power to determine just and reasonable rates. But the "cost" into which the Commission inquires under Section 206(b) includes a return on the amount invested, and therefore the Commission's determination of costs is in fact the equivalent of a determination of what would be a reasonable rate. Compare the retrospective determination of the cost of service in the *Hope* case (3 F.P.C. at 199-202) with the prospective determination of just and reasonable rates (3 F.P.C. at 202-205).

only determinations as to cost but also "information and reports" as to lawful and reasonable rates for the period in question, as an aid to state regulation. There is no reason why the authority granted by Sections 307(a), 205 and 206 may not be exercised to assist the district courts, where such a procedure is appropriate, as well as to assist state regulatory agencies.

But in any event, we think it clear that whether a fraud has been perpetrated on the Commission should first be determined by the Commission itself. Any order of the Commission vacating or refusing to vacate the filing claimed to be fraudulent would, as the court below declared, be reviewable like any other order of the Commission exclusively in the appropriate court of appeals under Section 313(b). Any civil damages attributable to the fraud, and which the Commission was not empowered to order paid, would then be recoverable, upon the basis of the Commission's findings, in a civil action at law. See Point III, *infra*.

III

The District Court Should Stay Its Hand Until the Commission Determines the Questions Over Which It Has Primary Jurisdiction

We have argued that the Commission has primary jurisdiction to determine whether a fraud has been perpetrated upon it, and in doing so to inquire into the reasonableness of past rates—even

though it may not issue reparations orders as to past rates. In very similar situations this Court has required the district courts to wait and follow an administrative determination as to the reasonableness of past rates when the administrative agency had no authority to grant reparations. Thus, the lack of power in the Interstate Commerce Commission to grant reparations for intrastate rates charged and collected which discriminated unduly against interstate commerce does not deprive it of power "to inquire whether injustice had been done and to make report accordingly" to the district court where a shipper's suit for restitution was pending. *Atlantic Coast Line Co.* v. *Florida,* 295 U.S. 301, at 312. And in *United States* v. *Morgan,* 307 U.S. 183, proceedings for the distribution of the fund collected under an invalid order of the Secretary of Agriculture were restrained pending a determination by the Secretary of the just and reasonable rates during the period covered by the fund. This Court pointed out that the lack of authority in the Secretary to award reparations in that proceeding did not affect his power to investigate and decide the reasonableness of past rates (p. 192).

In other cases, this Court has held that a district court having jurisdiction over a controversy should "stay its hand pending a decision by" the administrative agency as to a matter peculiarly within the agency's authority. *Smith* v. *Hoboken R. Co.,* 328 U.S. 123, 133; *Thompson* v. *Texas*

Mexican R. Co., 328 U.S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422; *cf.*, *El Dorado Oil Works* v. *United States*, 328 U.S. 12. In the *Thompson* case, the question related to a claim for trackage rentals which the Interstate Commerce Commission could fix "only for the future," but not retroactively. 328 U.S., at 148. The Court held that the Commission's power over trackage rights nevertheless made primary resort to the Commission necessary, stating (pp. 148-149):

> * * * Once the Commission has acted, the court may then proceed to enter judgment in conformity with the terms and conditions specified by the Commission. See *El Dorado Oil Works* v. *United States*, 328 U.S. 12.

The Court concluded, in terms we believe to be applicable here (328 U.S. at p. 151):

> * * * the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. * * *

As this Court said in the *Morgan* case, which, as has been seen, involved a situation very similar to that at bar (307 U.S. at 191):

> * * * [I]n construing a statute setting up an administrative agency and providing for

judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. * * *

CONCLUSION

These decisions and principles point the way to the proper disposition of the present problem. Although the Commission may not grant reparations, or award damages for fraud, it may—at least where fraud is alleged—investigate both the question of fraud and the related issue as to the lawfulness of past rates, vacate any filing found to be fraudulent, and ascertain what reasonable rate should have been accepted as the filed rate apart from the fraud. Where the District Court may award damages resulting from fraud,—even if it may not

grant reparations,—it should hold the case pending a determination of the administrative questions by the Federal Power Commission and thereafter enter an appropriate judgment predicated on the administrative finding.[26]

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[26] If this Court should conclude, contrary to the argument presented in Point I of this brief, that the district court may award reparations, the same procedure should be followed in a suit for reparations in which fraud is not alleged.

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